

Singh (Migration) [2022] AATA 1597 (4 March 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sukhjot Singh
REPRESENTATIVE:	Mr SURAJ HANDA (: 0637649)
CASE NUMBER:	1809629
HOME AFFAIRS REFERENCE(S):	BCC2016/1033112
MEMBER:	Stephen Conwell
DATE:	4 March 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

1.

2.

Statement made on 4 March 2022 at 6:40pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – adverse evidence of the sponsor’s different address – relationship is non-genuine and is only existent for the purpose of obtaining a migration outcome – applicant did not have a substantive visa at the time of application –not satisfied that there are compelling reasons for not applying the Schedule 3 criteria –decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65, 360, 376

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221, Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285

Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 61

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 9 March 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant (applicant):
 6. (a) did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was, at the time of her Partner visa application, the spouse or de facto partner of the sponsoring spouse; and furthermore
 7. (b) did not satisfy cl.820.211(2)(d) because the applicant does not meet the Schedule 3 criteria and the delegate was not satisfied there were compelling reasons for not applying those criteria.
8. The applicant was represented in relation to the review by his registered migration agent (representative). The applicant provided a copy of the delegate's decision to the Tribunal for the purposes of the review.
9. By letter dated 16 February 2022, the Tribunal wrote to the applicant via his representative advising that due to COVID-19 it was not conducting in-person hearings for the time being and he was therefore invited to participate in a video hearing via Microsoft Teams on 3 March 2022. The Tribunal determined it was reasonable to hold a video hearing having regard to the nature of this matter and the individual circumstances of the applicant.
10. On 23 February 2022 the representative informed the Tribunal that he and the applicant would attend the video hearing.
11. On 25 February 2022, the Tribunal wrote to the applicant via his representative advising of the existence of a s.376 certificate on the Department file, explaining that the effect of such a certification is that the Tribunal is given discretion whether to disclose the document and/or information covered by the certificate. The Tribunal informed the applicant that it had found the certificate to be valid because the document and/or information covered by the certificate may lead to identifying the informant and could lead to injury or danger to that person. The applicant was invited to make written comments on the validity of the certificate and the favourable exercise of the Tribunal's discretion to disclose that material.
12. On 2 March 2022, the applicant sent an email stating the following:

"I do not wish to appear before the AAT for interview fixed for 3 March 2022.

You are requested to make the decision on my appeal without taking my interview in hearing. Thank you."
13. Accordingly the Tribunal will determine the review application "on the papers".
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

15.

16. *Background*

17. Based upon the documentary evidence before the Tribunal, the applicant's immigration and relationship history is summarised as follows:
- on 18 June 2008, the applicant first arrived in Australia on TU 573 Student visa as the dependant spouse of his ex-wife. This visa ceased on 23 September 2010;
 - between 2010 to 2015 his ex-wife applied for, and was granted, further Student visas with the applicant as a dependant;
 - on 28 November 2013 the applicant applied as the Primary applicant, for a TU 570 Student visa. This visa application was granted on 3 January 2014 and ceased on 15 March 2015;
 - on 11 March 2015 he applied for a further Student visa TU 572, which was refused on 24 June 2015. On 7 July 2015 he sought a review of this decision with this Tribunal, however he withdrew this application on 30 March 2016.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issues in this case are whether at the time of application the applicant met cl.820.211(2) (a), and also whether there are compelling reasons for not applying the Schedule 3 criteria.
19. The Tribunal has regard to all of the evidence before it contained in the Department and Tribunal files including but not limited to, the decision record, a Marriage Certificate, photographs, third party statements in support of the relationship, financial information, communication records, statements and written submissions by the representative.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

20. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to have been the spouse of the sponsor who is an Australian citizen.
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
22. The parties claim to have married on 28 June 2015 in Victoria and provided a marriage certificate in evidence (Department file fol. 51). On the basis of this evidence, the Tribunal accepts the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
23. The Tribunal considered the r.1.15A(3) factors, noting that the applicant had submitted no further evidence to the Tribunal, other than the evidence before the delegate.

24. *Financial aspects of the relationship*

25. The Tribunal has taken into account the evidence provided as to the financial aspects of the relationship including any joint ownership of major assets, any joint liabilities, the extent of pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and any sharing of day-to-day household expenses.
26. The Tribunal notes the evidence includes bank statements from Westpac for the duration of multiple years and months, which include 2015 and 2016. The Tribunal attaches little weight to these bank statements as evidence that the parties' shared finances or shared responsibility for household expenses relationship. not jointly own real estate and did not have any joint liabilities. There is also no evidence that the parties jointly own any assets or owe any legal obligations to one another. Based on the evidence, the Tribunal was not satisfied that the applicant and the sponsor pooled their financial resources or shared day-to-day household expenses.
27. In light of these circumstances the Tribunal places little weight on the financial aspects of the relationship.

28. *Nature of the household*

29. The Tribunal takes into account the evidence as to the nature of the household including the parties' living arrangements and any sharing of the responsibility for housework.
30. On the evidence presented includes statements by each of the parties, regarding the nature of the household. There are also supporting documents such as, statements from the applicant's parents, supporting Form 888 statutory declarations, joint utilities and insurance bills and receipts. The Tribunal gives some weight to this evidence that the parties shared a household.
31. The delegate notes that no joint lease agreement was submitted in evidence, however the Tribunal attaches no adverse weight to this single absence of evidence, preferring to consider it as part of the Tribunal's holistic assessment of this factor of the relationship.
32. The parties provided statements in response to the Departmental letters, issued on 17 March 2016, 21 April 2016 and 20 October 2016. The final letter invited the applicant to comment on allegations and other information adverse to his claim of a genuine relationship between the parties. The Department explained that it had received information from another government agency, which indicated that the sponsor was not living at the applicant's claimed residential address. In response, the applicant claimed that that the sponsor had not updated her contact details with that particular government agency, hence there being different addresses. The Tribunal is not persuaded by the applicant's explanation regarding the claimed residential address of the parties, nor does it find the sponsor's statutory declaration to be a credible or genuine document. The Tribunal is in agreement with the delegate that whilst the sponsor appears to have signed it, the declaration does not 'ring true', rather it appears to stilted in tone and expression and is perhaps contrived by a third party.
33. The Tribunal finds that the evidence submitted does not support the claims that the parties share a household, rather the independent evidence, such as the sponsor's address details held by other government agencies, strongly suggest that the parties do not share a residence and the responsibilities of a household.
34. Therefore, the Tribunal places little weight on this consideration.

35. *Social aspects of the relationship*

36. The Tribunal has considered the evidence provided as to whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.

37. The parties have provided numerous documents, including their personal statements, Form 888 statutory declarations from friends, as well as photographs with each other, with a friend and with the sponsor's daughter and in a social setting. . While the photographs indicate that joint social activities have been undertaken by the parties and that there is some acknowledgement from the sponsor's daughter and some friends of the claimed relationship, they are not, in the context of other conflicting evidence, persuasive evidence of a committed spousal relationship. The Tribunal gives little weight to the Form 888 statutory declarations, noting that they are written by friends and not by family members. Furthermore, in the context of other evidence, the Tribunal finds there is an unacceptable risk that such statements have been contrived in order to support the applicant achieve a migration outcome.
38. The delegate noted that neither the applicant nor the claimed relationship feature in the sponsor's social pages. The applicant's explanation that the sponsor has racist online friends lacks credibility, particularly as it is not supported by any evidence. The Tribunal finds that the more likely explanation is that neither the applicant nor the claimed relationship are genuine features of the sponsor's life.
39. The Tribunal accepts there is some evidence in favour of the social aspects of the relationship, however in the context of the adverse evidence of the sponsor's different address held by a different government department/organisation, the Tribunal places minimal positive weight on this aspect of the relationship.
40. *Nature of the persons' commitment to each other*
41. The Tribunal has considered the evidence provided in relation to the nature of the persons' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
42. The Tribunal adopts the finding of the Full Federal Court in *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61, in observing that a decision-maker is not required to make the applicant's case. It is for the applicant to satisfy the Tribunal that the requirements of the Act and Regulations have been met. In this matter the Tribunal finds that the parties have not provided sufficient evidence that they have combined their affairs in any meaningful way, nor is there evidence that either party sees the relationship as long-term. In fact the evidence, or perhaps more correctly, the discrepancies in the evidence lead the Tribunal to conclude that relationship is non-genuine and is only existent for the purpose of obtaining a migration outcome.
43. On the basis of the above, the Tribunal does not consider that the applicant and sponsor have a mutual commitment to a shared life to the exclusion of others, are in a genuine and continuing relationship, and live together or not separately and apart on a permanent basis.
44. On the basis of the above, the Tribunal is not satisfied that the requirements of s.5F are met at the time the visa application was made and the time of this decision.
45. Therefore, the applicant does not meet cl.820.211(2)(a) and cl.820.221.
46. There is no claim or evidence before the Tribunal that the applicant meets any of the alternate criteria as contained in clauses 820.221 (2); 820.221 (3)(a) and (b)(i); or 820.221(3) (B)(ii).

Are the other requirements for a spousal relationship met?

47. Having considered all of the evidence and circumstances holistically, including the applicant's poor immigration history and the questionable timing of the relationship, the Tribunal is not satisfied that the parties are in a genuine spousal relationship.

48. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made. On the basis of the applicant's evidence to the Tribunal at the hearing, nor is the Tribunal satisfied that the requirements of s.5F(2) are met at the time of this decision.
49. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
50. Given these findings, it is not strictly necessary for the Tribunal to consider whether the applicant meets cl.820.211(2)(d), even though this was the other basis for the delegate's decision. The Tribunal makes the following findings addressing this criterion as an alternate basis for its decision and for the sake of completion.

Criterion 3001

51. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
52. The applicant did not dispute that the visa history outlined in the decision record and in the summary outlined by the Tribunal at hearing.
53. The Tribunal finds the applicant last substantive visa ceased on 15 March 2015, therefore he was not the holder of a substantive visa when he applied for a Partner visa on 10 March 2016. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

54. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
55. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
56. The provisions are not intended to facilitate persons who fail to comply with their visa conditions, deliberately manipulate their circumstances to give rise to compelling reasons or can leave Australia and apply for a partner visa outside Australia.
57. The Tribunal notes that no further or more current evidence was provided by the applicant. The Tribunal therefore has regard to the psychological assessments made of the sponsor in 2016. According the decision record, both assessments were made following one consultation. The psychologist reports state that the sponsor suffers from Post-Traumatic Stress disorder (PTSD), Adjustment order, and mixed anxiety. The recommendation being that it would be better for the sponsor's mental health if the applicant could be allowed to remain in Australia. Whilst the Tribunal does not question the findings of these reports, it places little weight on them due to the report having been made on the basis of a single consultation in which it appears much of the sponsor's mental problems were self-reported.
58. There is also the claim that the applicant has assumed the important the role of step-father to the sponsor's teenage daughter. However no evidence was provided to support this claim or to indicate the level of involvement he has in her life.
59. It was also claimed that the sponsor could not follow the applicant back to India as she and her young daughter would struggle to adjust to the cultural differences between Australia and India.

60. The Tribunal has considered all the circumstances of this case including the claims and arguments raised by the parties and in the written submissions and evidence. Having considered the totality of these circumstances, including the length and extent of the parties' claimed relationship the Tribunal is not satisfied that these circumstances justify a waiver of the Schedule 3 criteria. Therefore, the Tribunal does not consider these claims, whether considered singularly or cumulatively, to be a compelling and compassionate reason to waive the Schedule 3 criteria.

61.

62. *Section 376 certificate*

63. The Tribunal notes the s.376 certificate on the Department's file. It finds that the adverse information to which the certificate relates is discussed in the delegate's decision record, a copy of which was provided by the applicant to the Tribunal. Consequently no weight would be put on the documents referred to in the s.376 certificate.

64. *Conclusion*

65. The Tribunal has had regard to all circumstances identified by the applicant as relevant to her circumstances. The Tribunal does not accept that the parties are in a genuine spousal relationship to meet the requirements of s.5F.

66. The Tribunal has considered all the evidence singularly and cumulatively and is not satisfied that there are compelling reasons to not apply the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii). Further, there is no information before the Tribunal to indicate that the applicant would meet any of the alternate criteria in cl.820.211(5), (6), (7), (8) or (9).

67. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa

DECISION

68. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Stephen Conwell
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.